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IN THE

Supreme Court of the United States

October Term, 1971

71-1234

ROBERT E. KENNEDY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Philadelphia, Pa. 19124

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ROBERT E. KENNEDY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Humbly coming forth by this paper, Petitioner **Kennedy** does respectfully seek review of the herewith appended opinions delivered below in the United States Tax Court and in the United States Court of Appeals For The Third Circuit.

OPINIONS BELOW

The opinion delivered in the Tax Court is T.C. Memo. 1970-58, and is reported at 29 T.C.M. 255. The opinion delivered in the Court of Appeals is No. 19,530 and is not yet reported to petitioner's knowledge.

JURISDICTION

The statutory provision believed to confer on this court jurisdiction to review the judgement in question by Writ of Certiorari is Title 28, U.S.C., Sec. 1254 (1), (1970 ed., p. 7560).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case directly involves the following statutes which are appended hereto: *Internal Revenue Code of 1954*, Title 26, U.S.C., Secs. 62(2)(B); 162(a)(2); and 262, (each respectively found at 26 U.S.C.A., 1954 Ed., Vol. 1, (372), Vol. 2, (12), and Vol. 2, (763)). Because of the conflict existing between the Courts of Appeals this case does also directly invoke involvement of the Commission of Internal Revenue's *Revenue Rule* 61-95, found at 1961-1, Cum. Bull. 749, and appended hereto. It is additionally hoped by the petitioner that this court might also consider subsidiary constitutional provisions of a generally known nature, such as: freedom to interstate travel; freedom from forced servitude; and freedom to equally administered due process of tax law as being fairly comprised herein.

QUESTION INVOLVED

The only question presented for review is whether the petitioner is entitled to certain expenditures for travel, meals, and lodging as ordinary and necessary business expenses incurred while traveling to a "tax home" away from his "established home"/"previous tax home"/during a known temporary period of only six months while in pursuit of a trade or business.

The question presented for review was originally presented by the petitioner as an amendment to his 1966 calendar year income tax return in the form of a very detailed twenty-one page letter, dated June 13, 1968, to the Commissioner's Internal Revenue Office. The Commissioner did not act on this amended tax return and therefore there is no record of administrative level action relating to this question. The question does not involve the determination of any deficiency whatsoever in the petitioner's income tax liability, but does involve the determination of an overassessment in tax liability and a possible tax refund to the petitioner. The question was acted upon for the first time by the Tax Court as part of an all inclusive appeal by the petitioner from Commissioner action that did involve the assessment of tax liability deficiencies on other questions. The tax Court considered this question and rendered a decision thereon unfavorable to the petitioner on August 5, 1970. The petitioner timely appealed that decision to the Court of Appeals For The Third Circuit. The statutory provision believed to confer on the Tax Court jurisdiction over the question is Title 26, U.S.C., Sec. 7442 (1970 Ed., 7350).

STATEMENT OF THE CASE

As his statement of grounds for seeking this Writ of Certiorari the petitioner asserts that the Court of Appeals has so far sanctioned such a departure from the administering of equally adjudicated tax law throughout the entire United States, by the Tax Court, as to call for the exercise of this Court's power of supervision. The petitioner asserts that the Court of Appeals has so sanctioned this departure in rendering its decision in direct conflict with two very significant decisions rendered by the United States Court Of Appeals For The Ninth Circuit and at least one very significant decision rendered by the Tax Court where appeal from that Tax Court decision would have been to the appeals court for the ninth circuit.

The date of the judgment in the Court of Appeals is December 22, 1971. This date is also the date of entry. The statutory provision believed to have conferred jurisdiction upon the Court of Appeals for review of the Tax Court's decision is Title 26, U.S.C., Sec. 7482 (a), (1970 ed., p. 7362). A copy of this judgment is appended.

The petitioner, Robert E. Kennedy (hereinafter sometimes referred to as the petitioner, taxpayer, or Kennedy), has maintained a residence at 5626 Loretto Avenue in Philadelphia, Pennsylvania from his elementary school days to the present date, and has personally resided therein some 18 of those 22 years from his referenced 1950 school days. Periods of absence include 2 years in 1959 and 1960 when Kennedy was drafted into the Army from Philadelphia and then returned there after his separation, and 2½ years commencing with his United Air Lines employment in January, 1966. Except for that time in the army, from 1957 petitioner has been employed as a commercial airplane pilot and until 1966 had been able to find employment and continue to personally reside in Philadelphia. As the result of his employment application to United Air Lines in November, 1965, Kennedy's personal chrono-

logical residence during calendar year 1966 in question was: 9 days, Philadelphia; 3 months temporarily at United's school in Denver; 3 months personally residing in Chicago where United initially assigned him; 1 month in Philadelphia while United's mechanics were on strike; 2 months in Philadelphia while incurring expenses in Chicago due to circumstance unique to his employment that allowed him to personally reside in Philadelphia while assigned by United to be working out of Chicago; 1½ months temporarily at United's school in Denver; and 1½ months personally residing in San Francisco while maintaining, and then also owning, his Philadelphia residence for his own future use as well as providing the first real home in America that his mother could call her own. Petitioner continued to personally reside in San Francisco, while also maintaining his Philadelphia residence for his own future use and his mother's ongoing personal use, during 1967 and up until August, 1968, when he returned to again personally reside in Philadelphia. Contract, law governed where Kennedy could voluntarily, but not involuntarily, be based on the United Air Lines system throughout the continental United States. This contract was between United Air Lines and the Air Line Pilots Association. Because of employment circumstance, a pilot's initial productive flying assignment base might be either voluntary or involuntary, but in either event a pilot is required to remain at his initial assignment for at least six months. Kennedy was well aware of his employment circumstances and knew that he would not have to remain at his Chicago base for any period longer than the required six months. He in fact did transfer away from Chicago after six months, and knew of the irrevocable fact of his transfer away from Chicago within 1½ months of his reporting to Chicago. Kennedy accumulated numerous and varied personal possessions prior to 1966 at his home in Philadelphia. Because he knew he would not be staying in Chicago for any longer than a temporary period of

time, Kennedy did not move this cumbersome materialistic accruement from Philadelphia to Chicago. Thus maintaining his Philadelphia residence for his mother and his possessions while he also maintained a residence in Chicago, Kennedy incurred duplicate lodging expense, with meals and travel expense also being allocable thereto by law. Petitioner's assignment to San Francisco is not at issue, but that assignment is an example of an "indefinite" assignment. Kennedy claims his Chicago assignment to be the "temporary" assignment "away from home" for which he should be allowed his claimed deduction, as an amendment to his 1966 tax return, of $1,276.01 as a "traveling expense" for meals and lodging while at, and travel from and to Philadelphia, his Chicago assignment. The Tax Court disallowed these claimed traveling expenses in Chicago, and the Court of Appeals affirmed that disallowance in a four line opinion saying that Kennedy's some 56 pages of detailed argument was without merit. In disallowing the claim the Tax Court said:

> "Under the circumstances Philadelphia cannot be regarded as his *tax home* during 1966." (*Italics supplied.*)

It is not necessary that Philadelphia be the Petitioner's "tax home" during 1966. The decision by the Tax Court based on that statement immediately preceeding the court's statement of disallowance places the Tax Court in conflict with decisions rendered in the Court of Appeals For The Ninth Circuit, and also in conflict with its own decisions when rendered under the jurisdiction review reach of that Ninth Circuit.

ARGUMENT

The Tax Court's statement that Philadelphia can not be considered as Kennedy's "tax home," followed by the Court's disallowance of the claim, is in itself in conflict with the possibility that any taxpayer could ever be allowed any such a claimed "temporary assignment away-from-home" traveling expense. For if a taxpayer is away from his place of work he would not then be at his "tax home" in order to earn any income upon which to claim such tax deduction. Yet we know that taxpayers are allowed such a deduction when they are living at a "temporary" "tax home" away from a well "established home" from which it is not "reasonable" for them to make a lock/stock/and barrel move to that known to be temporary "tax home."

See; *Harvey v. C.I.R.*, 283 F.2d 491, (C.A. 9th Cir. 1960); and *Richard H. Sand v. C.I.P.*, T.C. Memo. 1969-155, reported 28 T.C.M. 774 (1969).

The case of *Wallace v. Commissioner*, 144 F.2d 407 (C.A. 9th Cir. 1944) is the earliest case favorable to Kennedy from the Ninth Circuit. That case can be distinguished from Kennedy's own case in that both Kennedy and Wallace departed from well established homes, where they had resided and worked, to take work in a more distant city for what each knew to be only a temporary period of work assignment in each taxpayer's respective city. The temporary period of work in each taxpayer's city became fact but in each instance the taxpayers did not return to the city and well established home that they had left in order to take the temporary work assignment. In each instance the city where the taxpayers Wallace and Kennedy wound up after their periods of temporary assignment were unanticipated due to not such totally removed life complexities. While *Wallace, supra.*, is a similar case and one of conflict between the circuits of appeals courts, its most

important contribution to Kennedy's case is that it has survived this court's substantially fair decision in *Commissioner v. Flowers*, 326 U.S. 465 (1946). In discussing the meaning of the word "home" at pp. 471/472 this court stated:

> "The meaning of the word 'home' . . . has engendered much difficulty and litigation . . . have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill v. Commissioner, supra.* (C.C.A. 4). On the other hand, the decision below and *Wallace v. Commissioner*, 144 F.2d 407 (C.C.A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See *Coburn v. Commissioner*, 138 F.2d 763 (C.C.A. 2).
>
> We deem it unnecessary here to enter into or to decide this conflict. . . ."

Therefore while Kennedy feels that the decision in *Flowers, supra.*, is substantially fair and not usable directly against him, it must be noted that this court has not decided that situations found similar to the Flowers case should also be applied to situations found similar to the *Wallace case;* and that Kennedy's case is similar to the Wallace case and in conflict with Courts of Appeals decisions in the Ninth and the Third Circuits.

The case of *Richard H. Sand supra.*, is very much notable in conflict; not only because it was decided by the Tax Court where jurisdictional review would come under the Ninth Circuit, but also because Judge Dawson who decided the *Sand case* was also the same judge who six months later was to decide Kennedy's case. It would appear that Judge Dawson is well aware of the conflict existing between the Courts of Appeals for the Ninth and the Third Circuits and adjusts his memoranda findings of fact and opinion according to the Circuit in whose jurisdiction the case is decided. While such a practice might be condoned in an effort to avoid unnecessary litigation,

especially by those people who can afford the litigation with reckless abandon such as the all powerful Internal Revenue Service, the practice certainly can lead to inequitable application of law, and did so in Kennedy's case. In order to effect a favorable decision in the *Sand case*, it appears that Judge Dawson considered the very broad life of taxpayer Sand; and to effect an unfavorable decision in Kennedy's case considered almost only the narrow life to Kennedy within the year of 1966. Judge Dawson did not elicit that information that he knew he could use in resolving this issue; yet he elicited much information on a question involving clothing given to charity. However, Kennedy believes there was sufficient information on the record so that, if it had been considered, such solicitation should not have been necessary.

The case of *Harvey v. C.I.R.*, *supra.*, is also notable for more than its substantial conflict between the Courts of Appeals for the Ninth and the Third Circuits. In one instance it is notable because it establishes the "test" of "reasonableness" for a taxpayer moving or not moving his established home to the location of a different "temporary" tax home location. It is a test now established in the Ninth Circuit and a test that this court has not had an opportunity to review because the commissioner has seen to it that the Harvey case was not appealed to this court (see Revenue Rule 61-95 appended). It is more than just Kennedy's own opinion that the Commissioner did not the Harvey case before this court for reasons of fear that he would lose his case and gain a favorable decision for taxpayers. This opinion is more credibly voiced by the Virginia Law Review in "*Note, A House Is Not A Tax Home*," 49 Va. L. Rev. 125, 163. Kennedy can not over estimate the import he places upon the credibility of that *Virginia Law Review* work; had this court's Rule 23, par. 3, not prohibited a supporting annexed appendix, Kennedy would have liked to make that whole Law Review work a part of this petition. Kennedy most sincerely believes that the conflict of courts and the

conflict of interests engendered in this *Harvey case* alone should cause this Court to grant this petition for Writ of Certiorari.

The sum of money represented by Kennedy's claim for which review is sought is somewhat insignificant, especially when viewed against the cost to date in appeals and in seeking review. However, Kennedy is sure that this is one court that will not place any monetary value of a case above justice; such has come to be the case with Kennedy. Kennedy also feels an obligation to his fellow airline pilots to gain justice in an area that could from time to time adversely affect them if he were to allow an inequitable decision to stand as precedent usable directly on that 25,000 or thereabouts pilot group.

There is still one more objective that Kennedy would hope to gain if this petition is granted. Kennedy's own brief before the Court of Appeals went into the "temporary assignment away from home"/ "tax home" situations and cases to an extent almost comparable with the work by the Virginia Law Review. Kennedy would present that same argument before this court and if this court should agree and comment on certain aspects of Kennedy's argument as it relates to possible types of temporary assignments, then it could mean tax benefits for millions of innocent city dwellers who incur an added expense in getting to work during mass transportation strikes when their homes become temporarily effectively removed from those travel requirements normal to their daily routine when there is no strike. At the moment of this petition there is such a mass transit strike throughout the state of New Jersey.

CONCLUSION

Wherefore, for the reasons set forth above, petitioner prays that this court grant his petition for Writ of Certiorari.

ROBERT E. KENNEDY, pro se

5626 Loretto Avenue
Philadelphia, Pa. 19124

APPENDIX

T. C. Memo. 1970-58

UNITED STATES TAX COURT

ROBERT E. KENNEDY, *Petitioner* [*v.*] COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Docket No. 3882-69 SC. Filed March 5, 1970.

ROBERT E. KENNEDY, *pro se.*

DAVID W. WINTERS, *for the respondent.*

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: Respondent determined an income tax deficiency of $147 against the petitioner for the year 1966. Respondent's notice of deficiency dated April 30, 1969, reflects the following:

Statutory deficiency		$147.00
Overpayment claimed (not refunded)	$447.64	
Eliminate—Federal gasoline tax	(8.93)	438.71
Net overpayment		($291.71)

By error respondent mailed to petitioner a refund check for 1966 in the amount of $495.87, representing an overpayment of $439.04 plus interest. Petitioner claimed in his petition an additional deduction of $1,276.01 which was not claimed in his Federal income tax return for 1966.

The issues presented for decision are: (1) Whether petitioner maintained a tax home in Philadelphia while he worked for United Air Lines in Chicago, so that he may deduct claimed traveling expenses; (2) whether petitioner is entitled to deduct the cost of new clothing as a business expense; (3) whether petitioner is entitled to deduct the

value of his old clothing given to a charitable organization; (4) whether petitioner is entitled to deduct "strike expenses"; and (5) whether petitioner qualifies for a tax credit for highway use of gasoline under section 6421(c)-(3)(A)(ii), Internal Revenue Code of 1954.[1]

FINDINGS OF FACT

Some of the facts were orally stipulated in the record and are so found.

Robert E. Kennedy (herein called petitioner) resided in Philadelphia, Pennsylvania, at the time he filed his petition in this proceeding. He filed his Federal income tax return for the year 1966 with the district director of internal revenue, Philadelphia, Pennsylvania.

Petitioner is a commercial airline flight officer. In November 1965, he applied for a position as a flight officer with United Air Lines. United employed him on January 10, 1966, and sent him to school at its flight training center in Denver, Colorado, until April 9, 1966. On his 1966 Federal income tax return petitioner claimed unreimbursed traveling expenses of $570.47 while he was in Denver. Respondent allowed the deduction.

In April 1966, United assigned petitioner to his first flight domicile in Chicago, Illinois, where he lived in an apartment. Petitioner did not choose Chicago, and would have preferred another assignment. By the terms of his contract with United petitioner was obligated to stay in Chicago for at least six months, but after that period he could request transfer to another location. His request would be granted if a vacancy existed at the other location and if a vacancy existed at the other location and if the vacancy was not filled by a transferee with more seniority. In 1966 United was expanding so rapidly, and vacancies were so numerous, that petitioner expected little or no

1. All statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

difficulty in transferring out of Chicago. In fact, after six months, he was able to transfer to another location he preferred.

On October 22, 1966, petitioner was transferred to San Francisco in response to his first request. He remained there until August 1968, when he was transferred to New York. At the time of trial petitioner was flying out of New York, while living in Philadelphia.

For 16 years prior to his joining United, petitioner had resided at his uncle's home at 5626 Loretto Avenue, Philadelphia, Pennsylvania. In September 1966, he purchased this house from his uncle.

While petitioner was stationed at Denver, Chicago, and San Francisco during 1966, he left various possessions in the Philadelphia house. For example, he left tools, books, some furniture, clothing which was too large, automobile and airplane parts, and model electric trains. He also left at an airfield in Philadelphia two airplanes worth several thousand dollars.

In his petition the petitioner claimed a deduction of $1,276.01 for traveling expenses, including amounts expended for meals and lodging.

At the time of his November 1966 interview with United, petitioner was 40 pounds overweight. Anticipating that his weight could affect his prospects of being employed by United, petitioner began losing weight. By January 10, 1966, petitioner had lost 15 pounds, and by the end of his training he had lost a total of 38 pounds. Although United did not order petitioner to lose weight, it did inform him that he was overweight, and petitioner kept United informed of his weight loss. Because of the importance of physical health to airline pilots, petitioner's weight loss was necessary to his employment.

Petitioner, in his slimmer form, needed a new wardrobe. He spent $722.82 for new clothes, and claimed $500 of such amount as a business expense on his 1966 Federal

income tax return. None of this amount was spent for uniforms.

Petitioner directed his mother to give some of his ill-fitting clothes to charitable organizations, which she did. Petitioner did not prove that the value of this clothing exceeded $100.

From July 8, 1966, until August 19, 1966, United's flight operations were shut down by a mechanics' strike. From July 18 until August 19, 1966, petitioner was placed on furlough without pay. Petitioner went to Philadelphia, looking for some sort of temporary work. Since petitioner still had to maintain his apartment in Chicago, he thought he was "entitled to something equal to per diem, and so forth, and I guess that is basically what my strike expense was." On his 1966 Federal income tax return petitioner deducted $289 for "strike expenses."

Petitioner's 1966 Federal income tax return was dated June 7, 1967, and was received by the district director of Internal Revenue at Philadelphia on June 12, 1967. Attached to the return was a Form 2688, requesting an extension of time for filing. On his income tax return petitioner claimed a credit of $8.93 for taxes paid for highway use gasoline. Respondent does not dispute the amount of the credit, but disallowed it because the return and the claim were not timely filed.

OPINION

1. **Claimed Traveling Expenses.** Generally, amounts expended for food and lodging are "personal, living or family expenses", and are nondeductible under section 262 of the Code and section 1.262-1(b)(3) and (5), Income Tax Regs. However, in certain circumstances, such amounts are deductible as ordinary and necessary business expenses under section 162(a)(2).[2] An essential requirement is that such expenses be paid or incurred "while away from home in the pursuit of a trade or business." See *Commissioner v. Flowers*, 326 U.S. 465 (1946).

For purposes of section 162(a)(2), "home" means the taxpayer's principal place of employment and not where his personal residence or house is located, if it is located in a different place from his principal place of employment. See *Commissioner v. Stidger*, 386 U.S. 287 (1967); *Ronald D. Kroll*, 49 T.C. 557 (1968); *Mort L. Bixler*, 5 B.T.A. 1181 (1927). If a taxpayer accepts temporary work away from his principal place of employment, he is "away from home." *E. G. Leach*, 12 T.C. 20 (1949); *Harry F. Schurer*, 3 T.C. 544 (1944). If he accepts work at a new location for an indefinite or indeterminate period, the new location becomes his new "home" for tax purposes. *Commissioner v. Peurifoy*, 254 F.2d 483 (C.A. 4th Cir. 1957), *affirmed per curiam*, 358 U.S. 59 (1958);

---

2. Sec. 162. Trade or Business Expenses.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on trade or business, including—

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

Ronald D. Kroll, *supra* at 562. Naturally, because of his mobility, a bachelor will often have greater difficulty than a married man in showing that it is unreasonable for him to maintain a residence near his trade or business, or that a duplication of expenses is other than a personal whim. (Rev. Rul. 60-189, 1960-1 C.B. 60, 68.)

The petitioner contends that because he was assigned, contrary to his request, to Chicago, and because he intended to transfer from there after six months, his work in Chicago was only temporary. It is entirely irrelevant that petitioner did not care for his Chicago assignment. No doubt many taxpayers with permanent employment would prefer a new job, a different city or a more pleasant climate. What is significant here is that the petitioner had only one principal place of employment and that was Chicago until he was transferred to San Francisco. The impermanence of an assignment alone does not make it "temporary." Cf. *Floyd Garlock*, 34 T. C. 611, 616 (1960). Petitioner had no trade or business in Philadelphia in 1966. It is true that he left a few personal possessions at his uncle's house in Philadelphia, and that he left two airplances there. It is also true that he bought his uncle's house in September of that year. But these actions were personally, not business, motivated. The evidence shows that petitioner had no immediate plans for returning to *work* in Philadelphia. His few possessions did not tie him there; and he had no family to consider in choosing his principal place of employment. His choice of transfer from Chicago was San Francisco, not Philadelphia. Under the circumstances Philadelphia cannot be regarded as his tax home during 1966. Consequently, we hold that the claimed traveling expenses in Chicago must be disallowed.

2. **New Clothes.** During 1966 petitioner lost weight, as required for his new job with United. He claimed a $500 deduction for the new clothes he purchased. All were ordinary street clothes. It is well settled that only clothes such as uniforms, which are required for employment and

which are not suitable for general or personal wear, qualify as business expenses under section 162. See, *e.g.*, *Jerome Mortrud*, 44 T.C. 208 (1965); *Betsy Lusk Yeamans*, 30 T.C. 757 (1958). Accordingly, we hold that respondent properly disallowed the claimed deduction as a personal expense.

3. **Old Clothes Donated.** As indicated in our findings of fact, the petitioner's mother gave his old clothes to charitable organizations. However, in view of petitioner's sketchy testimony, we have found the value of the clothing to be approximately $100. *Cohen v. Commissioner*, 39 F.2d 540 (C.A. 2, 1930).

4. **Strike Expenses.** Petitioner seeks to deduct $289 as "strike expenses." According to his testimony, the money was paid for rent, food and other necessities while he was not working during the mechanics' strike at United Air Lines. Clearly these are ordinary living expenses and are not deductible. (Section 1.262-1(b), Income Tax Regs.) With regard to this claimed deduction the petitioner testified: "I didn't know any ground for it, and I still don't know any ground for it." Neither do we.

5. **Nonhighway Federal Gasoline Tax Credit.** Petitioner claimed a credit of $8.93 for taxes paid on nonhighway use gasoline under section 6421. To be entitled to the credit petitioner was required to file a timely return. Section 6421(*c*)(3)(A)(ii). He testified that on April 17, 1967, the last day for filing, he mailed to respondent a letter requesting an extension of time for filing his Federal income tax return for 1966. Petitioner retained no copy of the letter and respondent has no record of receiving it. In addition, he attached a Form 2688 to his late return. Under the circumstances we are unable to accept his testimony on this point. Since his return was not mailed until June 7, 1967, and his application for an extension of time to file the return was also untimely, petitioner is not entitled to the credit.

To reflect our conclusions on the disputed issues, decision will be entered under Rule 50.

UNITED STATES TAX COURT

ROBERT E. KENNEDY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Docket No. 3882-69 "SC"

DECISION

Pursuant to the opinion of the Court filed March 5, 1970, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1966 in the amount of $128.00.

(Signed) HOWARD A. DAWSON, JR.
Judge.

Entered: Aug. 5, 1970

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,530

ROBERT E. KENNEDY, *Appellant*

v.

COMMISSIONER OF INTERNAL REVENUE

Tax Court No. 3882-69 SC

APPEAL FROM THE UNITED STATES TAX COURT

Submitted November 18, 1971

Before BIGGS, ADAMS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed December 22, 1971)

PER CURIAM:

We have examined with care the appellant's contention on this appeal and find them to be without merit. We will affirm the decision of the Tax Court upon the thorough opinion of Judge Dawson, 29 T.C.M. 255.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,530

ROBERT E. KENNEDY, *Appellant*

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket No. 3882-69)

ON APPEAL FROM A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: BIGGS, ADAMS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed with costs taxed against appellant.

ATTEST:

THOMAS P. ?
Clerk

December 22, 1971

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(2) Trade and business deductions of employees.—

* * *

(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * *

SEC. 162 [as amended by Sec. 4(b), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * *

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

* * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

RULINGS AND DECISIONS UNDER THE INTERNAL REVENUE CODE OF 1939 AND OTHER PUBLIC LAWS

SUBPART A.—RULINGS AND DECISIONS UNDER THE INTERNAL REVENUE CODE OF 1939

Rulings and decisions published in Part II, Subpart A, of the Internal Revenue Bulletin are based on the applications of provisions of the Internal Revenue Code of 1939 and unless otherwise noted therein are published without consideration to any application of the provisions of the Internal Revenue Code of 1954, the Federal Firearms Act, or other public laws.

SUBTITLE A.—TAXES SUBJECT TO THE JURISDICTION OF THE BOARD OF TAX APPEALS

CHAPTER 1.—INCOME TAX

SUBCHAPTER B.—GENERAL PROVISIONS
Part II.—COMPUTATION OF NET INCOME
SECTION 23(a).—DEDUCTIONS FROM GROSS INCOME: EXPENSES

Regulations 118, Section 39.23(a)—2: Traveling expenses. Rev. Rul. 61-95[1]

(Also Part I, Section 162; 26 CFR 1.162-2.)

The Internal Revenue Service does not agree with the test for determining the deductibility of meals and lodging as traveling expenses which was applied in the

[1]Based on Technical Information Release 314, dated April 18, 1961.

recent decision of the United States Court of Appeals for the Ninth Circuit in *John J. Harvey v. Commissioner*, 283 Fed. (2d) 491 (1960).

The question involved in that case was whether an aircraft worker who was transferred by his employer to Edwards Air Force Base to work for an uncertain period of time and who was continuously employed there for more than a year was traveling away from home for the purpose of deducting, under section 23(a)(1)(A) of the Internal Revenue Code of 1939, expenses incurred for his meals and lodging during that period.

The Ninth Circuit reversed the Tax Court and held that the taxpayer was "away from home" while at Edwards Air Force Base. The decision was based on the reasoning that since there was no reasonable probability known to the taxpayer that he would be employed at Edwards for a long period, it was not reasonable to expect him to move his permanent abode even though his employment there was indefinite in the sense that its termination could not be foreseen within a fixed period.

While a petition for certiorari to the Supreme Court of the United States was not filed in the *Harvey* case, the Service does not agree with the test which the Ninth Circuit applied in determining whether a taxpayer is at home or is away from home while working at his new station and will continue to apply its usual "temporary v. indefinite" test as explained in Revenue Ruling 60-189, C.B. 1960-1, 60, at 63-64. Under this test, a taxpayer is not traveling away from home unless, at the time his employment at a new duty station is begun, the termination of his employment here within a reasonably short period of time is foresee-

able. This position was approved in 1957 by the Fourth Circuit in *Commissioner v. Peurifoy*, 254 Fed. (2d) 483, affirmed 358 U.S. 59, Ct. D. 1832, C.B. 1958-2, 916, and in 1959 by the Fifth Circuit in *v. Commissioner*, 264 Fed. (2d) 309.

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No. 71-1234

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT E. KENNEDY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals was entered on December 22, 1971. The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on March 21, 1972, and no extension of time was granted. The petition was filed on March 28, 1972. Since the 90-day time limi-

[1] We are advised by the Clerk's office that petitioner's typewritten petition and "Motion to Dispense Temporarily with the Requirement for Printing" were filed out of time on March 24, 1972. His printed petition was filed on March 28, 1972.

tation is jurisdictional, the petition is untimely and should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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ROBERT E. KENNEDY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT

REPLY BRIEF IN ANSWER TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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IN THE

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REPLY BRIEF IN ANSWER TO RESPONDENT'S MEMORANDUM IN OPPOSITION

Petitioner Kennedy prays that this court not be misled by Respondent Commissioner's memorandum in opposition. Kennedy's notice of appearance, docket fee, "Motion to Dispense Temporarily with the Requirement for Printing," and typewritten petition were filed in good faith by Kennedy by timely deposit in the U.S. Mail on March 21, 1972.

Kennedy notes that the court's Rule 22(3) terminology "*filed with the clerk*" is not elsewhere defined within the court's rules. In attempting to comply in good faith with the court's rules, the Rule 22(3) terminology did not register any narrow literal requirement in Kennedy's mind that a paper must be physically presented in face to face filing with the Clerk prior to the last minute of the last day for filing the paper. What did register in Kennedy's mind was that in the Tax Court and in the Court of Appeals below the terminology "*filed with the clerk*" is allowed the broad literal requirement that a paper need only be physically deposited in the U.S. Mail prior to the last minute of the last day for filing the paper. Kennedy notes that the Court's Rule 22(3) does neither affirmatively nor negatively allow for the circumstance of filing a paper with the clerk via the U. S. Mail.

Had Kennedy not skipped over Rule 22(2) because it starts out to reference procedure in *criminal* cases, he might have had a clue to what now, too late, appears to be the court's view on filing papers with the clerk by mail. However, even narrow literal interpretation of Rule 22(2) would appear to be inequitous in this, the highest court of our land. There is no way of getting around the fact that, unless filing with the clerk can be considered timely in all timely instances of deposit in the U.S. Mail, the further any citizen resides from Washington, D.C. he will have less of his procedural time allocable to executing a paper because, as distance increases, more time must be allocated for travel to Washington and it must come from the same amount of supposedly equal procedural time allowed all geographically dispersed residents.

Kennedy does not try to say that the 90 days he had to file his petition were insufficient, although a great amount of his time was devoted to better acclimating himself to his newly promoted position of copilot, a position the lower courts have held must be filled with the highest degree of care and skill in U.S. air carrier operations. Kennedy had also just about given up out of frustra-

tion over the justice he felt he had received in the courts below; but alas, if hope was gone, Kennedy's faith in our system of justice rekindled itself, and he decided to file his petition. On March 13th, Kennedy asked his employer to allow him to drop a scheduled two day flight away from home from his schedule; for which tentative approval was given. At 5:00 A.M. on March 14th, Kennedy was called and told that he would have to fly his flight as scheduled because a snow storm had hit Chicago and operations had been disrupted to the extent that all reserve pilot coverage had been expended, and to the extent that Kennedy's scheduled flight would have had to have been cancelled in his absence. Kennedy was away from home on flights on March 14th and 15th, and again on March 16th, 17th, and 18th; he worked full time on his petition March 19th, 20th, and finished it the evening of March 21, 1972, when he timely mailed it in typewritten form to the court.

As a last resort only, Kennedy would hope to overcome any possible real technicaljty raised by the Commissioner by raising his own technicality. The Commissioner cites 28 U.S.C. 2101(c) as controlling in that area of limiting the period for filing a petition for a writ of certiorari to 90 days. Now maybe Kennedy is not reading the correct section of the 1970 edition of The Code; for he neither can see any specific period of limitation set forth in that section, nor any reference as to what *filing* shall be considered to consist of. Therefore, in the absence of any specifically cited precedent by the Commissioner to show why the court can not consider Kennedy's petition as being timely, Kennedy prays that the court not consider his petition as being untimely; and grant or deny the petition solely on merit, and within that jurisdiction cited in Kennedy's petition.

Respectfully submitted,

ROBERT E. KENNEDY, *pro se*

5626 Loretto Avenue
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May 9, 1972